

**BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS
ON REFERRAL BY THE COMMISSIONER OF REVENUE**

IN THE MATTER OF:)	
)	OAH No. 11-0271-CSS
V S)	CSSD No. 001131641
_____)	

DECISION AND ORDER

I. Introduction

The obligor, V S, appealed a Modified Administrative Child Support and Medical Support Order that the Child Support Services Division (CSSD) issued in his case on May 31, 2011. The obligee child is J, seven years old. The custodian is Y C. E.

The hearing was held on July 26, 2011. Mr. S participated by telephone; Ms. E appeared in person. Erinn Brian, Child Support Specialist, represented CSSD. The hearing was recorded.

Based on the record as a whole and after careful consideration, Mr. S's child support is modified to \$456 per month for one child, effective May 1, 2011.

II. Facts

A. Procedural History

Mr. S's child support obligation for J was set at \$348 per month in August 2004.¹ Ms. E initiated modification of the order on February 24, 2011.² On April 6, 2011, CSSD sent the parties a Notice of Petition for Modification of Administrative Support Order.³ Mr. S did not provide income information.⁴ On May 31, 2011, CSSD issued a Modified Administrative Child Support and Medical Support Order that set his modified ongoing child support at \$491 per month, effective May 1, 2011.⁵ Mr. S filed an appeal and requested a formal hearing on July 6, 2011, asserting he is currently unemployed and receiving unemployment benefits.⁶

1 Exh. 1.
2 Exh. 2.
3 Exh. 3.
4 Pre-hearing brief at pg. 1.
5 Exh. 4.
6 Exh. 5.

B. Material Facts

Mr. S and Ms. E are the parents of J, seven years of age. J lives with Ms. E and Mr. S lives with his girlfriend, her nine year-old son named X from a prior relationship and their four year-old daughter, Y. Mr. S's girlfriend formerly worked at No Name business, but she is currently unemployed due to a medical condition. There is no evidence in the record whether she may be able to return to work in the future.

For several years, Mr. S has worked for a company called No Name, Inc., laying communication cable on the North Slope.⁷ He has been laid off since mid-May 2011, but being unemployed for part of the year has been a regular part of Mr. S's employment with No Name.⁸ At the time of the hearing Mr. S was trying to arrange another job in which he would be working on computers on a contract basis. He said if he did not get it he would return to the slope this fall.

Ms. E requested that the modification order be affirmed but did not have much testimony beyond that. She added Mr. S is in arrears of about \$2,548, and that his household is not as large as he claims because his girlfriend's son is in the custody of his grandmother.

III. Discussion

A. Mr. S's Income

A parent is obligated both by statute and at common law to support his or her children.⁹ Civil Rule 90.3(a)(1) provides that an obligor parent's child support amount is to be calculated based on his or her "total income from all sources." Modification of child support orders may be made upon a showing of "good cause and material change in circumstances."¹⁰ If the newly calculated child support amount is more than a 15% change from the previous order, Civil Rule 90.3(h) assumes a material change in circumstances has occurred and the order may be modified.

If a parent has erratic income from year to year, the court rule that governs child support calculations, Civil Rule 90.3, allows CSSD to use the person's average income figure taken from several years' worth of historical income data.¹¹ In most cases, CSSD uses the average income

⁷ Exh. 6 at pg. 1.

⁸ *Id.*

⁹ *Matthews v. Matthews*, 739 P.2d 1298, 1299 (Alaska 1987) & AS 25.20.030.

¹⁰ AS 25.27.190(e).

¹¹ Civil Rule 90.3, Commentary III.E.

figures derived from a three-year period of time, but time periods of up to five years have been used if the parent's income has been erratic and figures for that length of time are available from the Alaska Department of Labor and Workforce Development (ADOL). Civil Rule 90.3 states:

Time Period for Calculating Income. Child support is calculated as a certain percentage of the income which will be earned when the support is to be paid. This determination will necessarily be somewhat speculative because the relevant income figure is expected future income. The court must examine all available evidence to make the best possible calculation.

The determination of future income may be especially difficult when the obligor has had very erratic income in the past. In such a situation, the court may choose to average the obligor's past income over several years^[12]

Mr. S's child support was set at \$348 per month in 2004.¹³ Pursuant to the petition for modification, CSSD calculated his modified child support at \$491 per month, based on the last four quarters of earnings reported for him to the ADOL, all of which totals \$33,682.05.¹⁴ CSSD added the 2010 PFD of \$1,281, for total income attributed to Mr. S of \$34,963.05.¹⁵

Prior to the hearing, CSSD submitted another child support calculation for consideration. CSSD arrived at this amount, \$456 per month, from the average of Mr. S's earnings and unemployment benefits that he received during the period from 2008 through 2010.¹⁶ This calculation is somewhat lower than the agency's earlier modification amount because it better reflects the layoff periods Mr. S has had, which are shown in the latter pages of the ADOL report.¹⁷

Using Mr. S's average income from the last three years is the best method of calculating his modified child support obligation. Mr. S's income has had erratic swings during the last three years, with him experiencing months-long layoff periods each year. Having his child support calculated this way will lessen somewhat the challenge of paying child support while he is receiving only unemployment benefits.

12 Civil Rule 90.3, Commentary VI.E.1.

13 Exh. 1.

14 Exh. 4 at pg. 6; Exh. 6.

15 Exh. 4 at pg. 6.

16 Exh. 7.

17 Exh. 6 at pgs. 2-4.

B. Mr. S's Other Children

One of Mr. S's primary issues in this appeal is the fact that neither of his other two children, his girlfriend's son, X, or their daughter, Y, were taken into consideration in the calculation of his support obligation for J.

Mr. S's child support calculation for J correctly does not reflect either child currently living in his home. Civil Rule 90.3(a)(1)(D) provides that a parent who supports a prior child in the home is entitled to a deduction from income for that child. There is no dispute that X lives with Mr. S and that he is older than J. However, X is not the obligor's biological child, he is a stepchild. Mr. S would have to legally adopt X in order to be credited with supporting the child in his home. Obviously Mr. S feels a moral imperative to support X, but the obligor has a *legal obligation* to support his biological child, J.

Mr. S has one other biological child in the home, but Y is younger than J. Civil Rule 90.3 states that in general, an obligor parent's child support obligation should not be reduced for that parent's *younger* children.¹⁸ This is because the parent has a choice not to have subsequent children if he or she cannot support the children from his or her first family.

Therefore, because X is Mr. S's stepchild and because Y, although Mr. S's biological child, is younger than J, Mr. S's legal duty to support J takes priority over both children in his home.¹⁹ J is entitled to receive child support in an amount commensurate with Mr. S's ability to pay, as calculated pursuant to Civil Rule 90.3. That obligation has been calculated at \$456 per month based on his average income from 2008 through 2010.

C. Financial Hardship

Mr. S did not specifically claim that he has a financial hardship, but the facts of this case suggest it should be addressed.

Child support determinations calculated under Civil Rule 90.3 from an obligor's actual income figures are presumed to be correct. The parent may obtain a reduction in the amount calculated, but only if he or she shows that "good cause" exists for the reduction. In order to establish good cause, the parent must prove by clear and convincing evidence that "manifest injustice would result if the support award were not varied."²⁰ The presence of "unusual

¹⁸ Civil Rule 90.3, Commentary VI.B.2.

¹⁹ See *Dunn v. Dunn*, 952 P.2d 268, 271 (Alaska 1998).

²⁰ Civil Rule 90.3(c).

circumstances" in a particular case also may be sufficient to establish "good cause" for a variation in the support award.²¹

Mr. S's current unemployment has created difficult times for him, but based on the evidence in its entirety, his situation does not present "unusual circumstances" of the type contemplated by Civil Rule 90.3. As amply shown in his earnings report and acknowledged by Mr. S, his unemployment is only temporary. Since he is off work sometimes for several months, the easiest way to lessen the financial impact of that unemployment is to find another job while he is laid off – either part-time or temporary. This would significantly help his situation.

IV. Conclusion

Mr. S did not meet his burden of proving by a preponderance of the evidence that CSSD's Modified Administrative Child Support and Medical Support Order was incorrect, as required by 15 AAC 05.030(h). CSSD's revised calculation based on his average income is correct and should be adopted. Mr. S has other children in the home but neither one of them entitle him to a reduction in his child support obligation for J.

V. Child Support Order

- Mr. S is liable for modified ongoing child support in the amount of \$456 per month, effective May 1, 2011;
- All other provisions of CSSD's Modified Administrative Child Support and Medical Support Order dated May 31, 2011, remain in full force and effect.

DATED this 15th day of August, 2011.

By: Signed
Kay L. Howard
Administrative Law Judge

²¹ Civil Rule 90.3(c)(1).

Adoption

This Order is issued under the authority of AS 43.05.010 and AS 44.17.010. The undersigned, on behalf of the Commissioner of Revenue and in accordance with AS 44.64.060, adopts this Decision and Order as the final administrative determination in this matter.

Under AS 25.27.062 and AS 25.27.250, the obligor's income and property are subject to withholding. Without further notice, a withholding order may be served on any person, political subdivision, department of the State, or other entity.

Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with AS 25.27.210 and Alaska Rule of Appellate Procedure 602(a)(2) within 30 days after the date of this decision.

DATED this 2nd day of September, 2011.

By: Signed _____
Signature
Kay L. Howard _____
Name
Administrative Law Judge _____
Title

[This document has been modified to conform to the technical standards for publication.]